

STATE OF MICHIGAN
COURT OF APPEALS

PONTIAC SCHOOL DISTRICT,

Respondent-Appellant,

v

PONTIAC EDUCATION ASSOCIATION,

Charging Party-Appellee.

FOR PUBLICATION
January 5, 2012

No. 300555

MERC

LC No. 04-000215

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

JANSEN, J. (*dissenting*).

Because I believe that physical therapists (PTs) and occupational therapists (OTs) constitute “noninstructional support staff” within the meaning of MCL 423.215(3)(f), I respectfully dissent.

MCL 423.215(3)(f) provides:

Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

* * *

(f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.

It is clear that contracting for “noninstructional support services” is a prohibited subject of collective bargaining between public schools and their employees. MCL 423.215(3)(f); MCL 423.215(4); see also *Mich State AFL-CIO v Employment Relations Comm*, 453 Mich 362, 380; 551 NW2d 165 (1996) (opinion by BRICKLEY, C.J.). However, the Legislature has not defined the phrase “noninstructional support services.” When a term or phrase has not been defined by

the Legislature, this Court must give the term or phrase its ordinary and commonly understood meaning. MCL 8.3a; *Stanton v Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002).

Although not directly germane to the case at bar, MCL 380.761(1) provides a list of various “noninstructional services” that intermediate school districts are required to address when issuing their reports on the sharing of services. Among others, the statute requires that intermediate school districts consider “[a]ny other *noninstructional services* identified by the superintendent of public instruction.” MCL 380.761(1)(m) (emphasis added). Within the context of special education, the superintendent of public instruction has differentiated between “[i]nstructional services,” “[o]ccupational therapy,” and “[p]hysical therapy.” Mich Admin Code, Rule 340.1701b(a), (c), and (f). In particular, Rule 340.1701b(a) provides that “[i]nstructional services” include only those “services provided by teaching personnel . . .”

PTs and OTs are not teachers. Instead, they are licensed under Part 178 of Michigan’s Public Health Code, MCL 333.17801 *et seq.*, and Part 183 of Michigan’s Public Health Code, MCL 333.18301 *et seq.*, respectively. In other words, at least in the context of special education, the superintendent of public instruction has determined that PTs and OTs provide services that are *noninstructional* in nature.

I find persuasive this differentiation between instructional services, physical therapy services, and occupational therapy services. Quite simply, the services provided by PTs and OTs are not a component of the traditional, instructional environment of the classroom. Instead, they are specialized services that are provided only for certain students with specific types of disabilities. In short, the functions performed by PTs and OTs are not *instructional* within the commonly understood meaning of that term. It follows, in my opinion, that these services are *noninstructional* in nature.

I conclude that the MERC committed a substantial and material error of law when it determined that physical therapy services and occupational therapy services are not “noninstructional support services” within the meaning of MCL 423.215(3)(f). See *Oak Park Pub Safety Officers Ass’n v Oak Park*, 277 Mich App 317, 324; 745 NW2d 527 (2007). Because physical therapy services and occupational therapy services are “noninstructional support services,” MCL 423.215(3)(f), the Pontiac School District was not required to collectively bargain with the Pontiac Education Association before contracting with a private entity to provide PT and OT services. I would reverse the judgment of the MERC and remand for a dismissal of the unfair labor practice charge.

/s/ Kathleen Jansen